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In the Supreme Court of the United States

OCTOBER TERM, 1924

THE UNITED STATES, APPELLANT
v.
CORNELL STEAMBOAT COMPANY, APPELLEE } No. 265

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

STATEMENT

This is an appeal from the judgment of the Court of Claims in favor of a tugboat owner for $24,822.24.

The Cornell Steamboat Company, during 1917 and 1918, by informal charters evidenced by letters, chartered to the War Department 12 tugboats for use in shifting and towing government vessels about the harbor of New York. The hire was a per diem rate. When the tug carried a single crew this rate was for 12 hours' service; when the tug carried a double crew, for 24 hours' service. The owner agreed "to find everything in connection with their maintenance and operation, excepting coal and water." In some instances it furnished

coal and the government was charged for the coal used. The owner selected and appointed the officers and crews of the tugs and they were subject to dismissal or discipline only by it. The owner provisioned and supplied the tugs, except with coal and water, and assumed and performed the duty of maintaining the tugs in efficient order and condition. The tugs were employed in the harbor-towing service only. Following the usual practices, whether the hiring be for a trip, hour, day, or month, the government gave all necessary instructions as to vessels to be moved or shifted. The actual navigation rested with the officers and crew who were appointed and paid by the owner. In the performance of these duties, we say the officers and crew represented the owner. The *Ira M. Hedges,* one of the tugs, sank, and the owner, at its own expense, raised and repaired the vessel. This occupied 54 days.

Although the charter rate was on a daily basis, the accounts were submitted monthly. The government deducted from the monthly accounts, which covered hire for the 30 or 31 days each month, the sum of $8,100, representing the hire of the *Hedges* billed for the 54 days at $150 per day during which the tug was raised and repaired (she was in actual use only 26 days in all). The government made deductions for time lost when the tugs reported with short crews or when they were not in condition to perform service or if too long

a time was consumed in taking aboard the supplies furnished by the owners. (Findings of fact III and IV; R. p. 25.) These deductions totaled $24,822.48. These deductions were made and notice thereof given the owner as the monthly accounts were submitted. The government paid the balance and the owner accepted the amount under protest. The government at the time regarded the tugs hired upon a service basis, with the owner remaining responsible for the operation, control, and navigation of the tugs through the officers and crews, their servants. It does not appear that owners at that time expressed the opinion that the tugs were demised, which was the position later taken by them.

The owner's present claim was to recover the moneys which the Government disallowed. The majority opinion of the Court of Claims (Hay, J.) determined that the contract for the use of the tugs constituted a demise of the tugs to the government—owner *pro hac vice*—and the government was responsible for the hire of the tugs for the full periods. Judgment was entered for the full claim, including $8,100 hire for the period the *Hedges* was repaired by owners.

The dissenting opinion (Booth, J.) after making a most careful review and application of the facts, concludes that the contract for the use of the tugs was a contract for service upon a daily basis and not a demise of the boats, with a duty

upon the owner to man, equip, navigate, maintain in good order and repair, and to provide efficient operation. In this view, as the deductions related to owner's breach of contract to have tugs in working order and condition, such deductions were proper.

This appeal, the government suggests, presents the issue whether the charter arrangements, evidenced by the informal written contracts and the conduct of the parties thereunder, constitute a contract for service and not a demise of the tugs as the majority opinion of the Court of Claims has found. The government suggests the facts bring the case squarely within the rulings of this Court in *New Orleans-Belize Royal Mail S. S. Co., Ltd.*, v. *United States,* 239 U. S. 202.

The issues thus are presented.

ARGUMENT

We apply the rule announced in this court in *New Orleans-Belize Royal Mail and Central American S. S. Co., Ltd.*, v. *United States,* 239 U. S. 202, 206, as definitely determining that the charters of the tugs in this case were contracts for hire and did not constitute a demise of the tugs. In denying that the charter party constituted a demise of the vessel, this court observed (Mr. Justice Holmes):

> The general owner furnished the crew and a master who at least regarded himself as representing its interests since he protested against commands that he received.

> * * * We deem it plain that the control and navigation of the vessel remained with the general owner, although the directions in which it should proceed were determined by the United States. Authority to direct the course of a third person's servant does not prevent his remaining the servant of the third person (citing cases). We conclude that the possession followed the navigation and control. The case resembles *Morgan* v. *United States,* 14 Wall. 531, not *United States* v. *Shea,* 152 U. S. 178, as in the latter it was found that the vessel was under the exclusive management and control of the Quartermaster's Department.

In *The Spokane* (C. C. A., 2nd Cir. 1923), 294 Fed. 242, the court said (p. 246):

> * * * It (charterer) did not have common possession or control of the navigation or operation of the vessel. There was no demising or letting of the vessel itself. The charter vested in the charterer no possession or custody of the steamer, with the rights or obligations incident to a demise or possession. It was simply a contract of affreightment for a period of time—the navigation season of 1920—at a stipulated price per day, with the owner agreeing to furnish the ship fully manned and equipped, and at the owner's expense to maintain and operate it in carrying cargoes of automobiles or other cargoes to be furnished by the charterer. Since it appears that the possession was at all time in the appellee (owner), but the actual custody was in the ship's master,

who was selected and paid by the owner, and who in turn hired the crew and controlled the management and navigation of the ship, no liability for this act of negligence can be imposed upon the charterer.

In *Bramble* v. *Culmer,* 78 Fed. 497 (C. C. A., 4th Cir. 1897) (p. 501):

> It is the general and unvarying incident of all charter parties that the owners of vessels are charged with the duty of navigating them and parties must, in reason, be understood to contract with reference to such obligation, unless it is excluded by special contract or necessary implication. It is not contended here that there was any express contract at the time the vessel was chartered in which the charterers undertook to navigate the vessel. The master, mate, and crew were selected by the owners and paid by them. The charterers undertook to pay a lump sum for the voyage, which sum was divided between the owners and the crew in the proportion before stated. This was but an ordinary contract of affreightment and if the schooner had been lost on the way out to Tarpum Bay, there could have been no pretense that the charterers were liable. * * *
>
> When a shipowner agrees to carry goods by water, or to furnish a ship for the purpose of carrying goods in return for a sum of money to be paid to him, such contract is called a " contract of affreightment." The charterer thereby acquires the right to the

temporary use of the vessel for the carriage of his goods, but the control and possession of the vessel remain in the owner, through the master and crew, who continue to be his servants. When a ship is let to another for a period of time and the owner during that time has nothing whatever to do with the appointment of her officers and crew, or with the working or management of her, that is called a " demise " or " letting " of the ship. * * *

The result of all the cases seems to be this: Wherever the shipowner undertakes to act as carrier of goods, and appoints the master and crew, the responsibility for her safe navigation rests upon him; but wherever the ship is completely transferred to the hirer for a period of time, and the shipowner has nothing whatever to do with the appointment of her officers and crew, then the charterer becomes responsible for her navigation.

In *Clyde Commercial S. S. Co.* v. *West India S. S. Co.* (C. C. A., 2nd Cir. 1909), 169 Fed. 275, the rule is thus stated by Ward, C. J., speaking for the court (p. 277):

It will thus be seen that the owner officered, manned, and provisioned the vessel, was in entire control of her navigation, and bound to maintain her during the charter party in good condition. The expression " delivery " of the vessel to the charterer and " delivery " by it at the end of the term to the owner is to be construed in connection

> with these provisions and with the further provision that she was to be " placed at the disposal of the charterers " to the extent of the space agreed upon. We entertain no doubt that the charter did not amount to a demise of the vessel. *Reed* v. *United States,* 78 U. S. 591, 20 L. Ed. 220; *United States* v. *Shea,* 152 U. S. 178, 14 Sup. Ct. 519, 38 L. Ed. 403. *If she had been at fault for a collision during the term, it would scarcely be contended that the charterers would be personally responsible.* [Italics ours.]

We examine the facts.

The agreements or charters consist of letters of proposal and acceptances which vary in their wordings. We observe these wordings as indicating the purposes intended by the parties (R. p. 16):

> We confirm our verbal arrangements * * * to charter to you the Tug *Primrose* * * * and the Tug *Charlie Lawrence* * * * with a single crew and everything found, excepting coal and water, which you (government) are to furnish, at the rate of $75 for each and every day per tug. * * *
>
> (R. p. 17) Tugs *John T. Welch* and *Ellen M. Ronan:* The price of the *John T. Welch* to be $80 per 12-hour day * * * the price of the *Ellen M. Ronan* to be $150 per day * * * We (owners) are to furnish everything for these tugs, with the exception of coal and water, which you are to furnish.

Victoria (p. 19): The price to be $150 per 24-hour day for each and every day of the charter period; *we to supply everything in connection with her maintenance and operation, with the exception of coal and water, which you are to furnish.* [Italics ours.]

The government's acceptance reads in part (R. p. 19):

It is understood that *you will supply double crew and everything in connection with her maintenance and operation, with the exception of coal and water, which is to be furnished by this service.*

Wilson P. Foss (R. p. 20): We (owners) will charter to you the Tug *Wilson P. Foss* for use at the Hoboken Army piers for $80 per day; *we to furnish everything in connection with her maintenance and operation,* with the exception of coal and water, which you are to furnish. The *Foss* is to operate with a single crew.

J. G. Rose (p. 22): It is agreed that we (owners) are to furnish her with a double crew for 24 hours service and *to find everything in connection with her operation* with the exception of coal and water which you are to furnish. The price is $150 per day of 24 hours for each and every day of the charter. * * * It is agreed that the said Tug *J. G. Rose* shall be allowed one day in each 30 to wash boiler and that this wash boiler day shall be paid for at the foregoing rate of hire. * * *

Tug *S. L. Crosby* (p. 23): *We to furnish everything* with the exception of coal and water which you will furnish.

R. J. Foster: We will have a double crew on the Tug *R. J. Foster* to-night so that her rate from this time on until such time as she is singled down again, and in your service, will be $150 per day. * * * We will deliver to him to-morrow upon his request the Tug *W. H. Baldwin,* single crew *to work at $75 per day,* you to furnish the fuel.

Charlie Lawrence (p. 24): We (owner) delivered to you to-day the Tug *Charlie Lawrence* to work as long as you may need her at the rate of $75 per day, we to furnish everything in connection with her operation, with the exception of coal and water. * * * We will deliver to you to-morrow (January 27) the Tug *G. W. Decker* to work double crew for such time as you may need her at the rate of $150 per day, you to furnish coal and water, and if we furnish the coal and water, it will be charged to you at the cost aboard the tug. Please understand that the *Charlie Lawrence* operates with a single crew.

These special arrangements intend the charter of the use of tugs, some for a day of 12 hours, others for a day of 24 hours, at a daily rate. We do not believe that for boats let for only a 12-hour period per day, the government assumed any responsibility for them during the night, when they were off of service. To charge the government with such liability there would have to be a direct

agreement imposing such liability upon the government. The letting for a 12-hour day is inconsistent with the reading that the contract amounted to a demise of the boat.

Thus the owner, by express terms, agreed to supply everything in connection with the *maintenance and operation* of the tugs, with the exception of coal and water, which the government was to furnish. The owner thereby undertook to provide and pay the crew. The charterer was without authority to nominate or select the officers and crew or to discharge or discipline them. The owner provided subsistence for the crew, ship's stores, including oil for engines and machinery, assumed all responsibility for keeping the tugs equipped and in proper running order and condition without limitations of any kind or character.

The owner adopted the practice of submitting accounts monthly. The hire of the tugs continued from January to June. When monthly accounts were submitted, which covered full 30 to 31 days, the government made deductions covering periods of time, when one of the tugs reported with a short crew or not in condition to perform the service required and if too long a time was consumed in the opinion of the officer in charge when taking on supplies. Notice thereof was given the owner. This practice clearly denies that the government considered the agreement a demise of the vessel. To the contrary it insisted that the owner properly man and equip its tugs as provided and it denied

the right to discipline the crews for lax attention in the handling of the tugs; rather it imposed upon the tugboat owner penalties for its failing to provide full crews and to discipline the officers and crew, which it regarded owner's duty to do. Although the deductions were accepted under protest, there is no suggestion by owner, so far as this record shows, that it insisted that the arrangement was a demise of the tugs.

Again (R. p. 25), when the Tug *Ira Hedges* sank (details not stated by the finding), the owner at its own expense raised the vessel and repaired it. This it was bound to do by the terms of the charter. If the charter is to be read as a demise of the tugs, such loss would have been borne by the government as *pro hac vice* owner and not by the owner. The owner promptly arranged for the raising and repair of the tug at its own expense. This definitely must determine that the hiring of the tugs did not constitute a demise. The tug was in the physical possession of owners during the period of raising and repairs, covering 54 days. The present claim allowed by the court includes the payment of charter hire for these 54 days, totalling $8,100. The tug was only in service 26 days.

The services for which the use of the tugs was secured is the customary service for harbor tugs whether upon the hourly, daily, monthly or yearly basis, and intended their employment in the shifting of vessels from one point in the harbor to an-

other. Directions as to what vessels shall be moved and from where and to where are always given by the charterer. In such uses the master and crew exercise their own judgment and experience as navigators and tugboat men and the success of their operations depended upon proper experience and the exercise of good judgment. We do not believe that had any of the tugs done damage to third vessels through negligent maneuvering on the part of the masters and crews of the tugs that any one would have considered, under the terms of these contracts, holding the Government responsible for the negligent acts of such officers and crews. We read the arrangement to require owners to bear the responsibility for such losses. If the contract is to be considered a demise, the Government would be responsible for such losses.

It is common knowledge that tugs employed in harbor service keep a log of the movements of the tug and the services they perform covering every day, whether the tugs are in the service of the owners or if they are hired to others. The fact that such logs were kept under the direction of the Army Transport Service can not be considered a factor determining the arrangements a demise. To the contrary, as the transportation service did require such logs to be kept so as to check up on tugs' performances and made deductions by the showings of the logs because owner failed to provide full crews or to properly maintain the boat, these requirements rather establishes the arrangement to

be one of hiring and not of demise. As indicated, the owner assumed and performed the duty of keeping the boats efficient for the service. With respect to one of the tugs (Tug *J. G. Rose,* R. p. 22) it provided that the tug " shall be allowed one day in each 30 to wash boiler and that this wash boiler day shall be paid for at the foregoing rate of hire." This suggests that control over the operation and navigation of the tug at all times remained in the owner, otherwise there would be no reason for this arrangement. This is consistent with the finding of fact V as made by the Court of Claims. (R. p. 26.)

It is common knowledge that the government, during this period, in a large number of instances, took over tugs and other classes of vessel property by requisitioning the use of such vessels upon the bare-boat basis or by taking title. We believe that had the government intended its arrangement for the use of these tugs to amount to a demise that it would have adopted the plan for taking over the use of the vessel on the bare-boat basis under the same terms and arrangements which it did in respect to other tugs and vessels. We read the act of arranging for the use of these tugs in the informal way adopted to be a hiring of the service of the tugs, rather than a demise. The use to which the tugs were devoted is the common and usual use of harbor tugs at New York.

The rule is settled (*Reed* v. *United States,* 11 Wall, 591, 592):

> Courts of justice are not inclined to regard the contract as a demise of the ship if the end in view can be accomplished without the transfer of the vessel to the charterer.

The dissenting opinion by Judge Booth carefully reviews the facts and conduct of the parties as definitely determining the charter arrangements one for service and not a demise. The review states (pp. 29–31):

> The findings disclose, first, that the service to be rendered was a per diem towage service, to be paid for by the day, for a stated period of time. It may not be successfully contended that as to the twelve-hour boats the Government assumed any responsibility for them during the night. At the close of the twelve-hour day they must of necessity be within the ownership of the plaintiff company. Such a contract and such a service is directly in conflict with the idea of a demise of the boats. Second, the plaintiff company agreed to furnish everything for the boats except coal and water, and even coal was to be furnished by the plaintiff, i. e., loaded upon the tugs at the cost of the defendant. Furnishing everything included the crew, the one essential element of navigation. Assuredly it is manifest that the defendant had no primary authority or jurisdiction over the crew. The defendant could do no more than

direct the commander what cargo to take and where to go to discharge it. The defendant was without authority to enforce discipline with respect to the crew, and could not discharge a member thereof or supply a vacancy therein. One, if not the most serious, complaint of the defendant was lack of sufficient and competent crews. The plaintiff company at no time refused to acknowledge this responsibility. It is nowhere disputed that the plaintiff company employed and paid the crews and that the crews navigated the boats in accord with their judgment and experience as navigators. If the defendant was the owner of the boats pro hac vice, this one stipulation of the contracts is obviously contrary to the usual ones, wherein a demise of a vessel has been held.

An examination of the cases discloses that in cases of a demise of the vessel the owner parts with all control over the same, and he is as effectually dispossessed, for the time being, of the vessel as if he had sold the same. The charterer becomes responsible for all that happens during the life of the charter party and is vested with all the authority and power of an owner.

Nothing militates more strongly against the plaintiff's contention than the fact that it, through its own crews, navigated the boats between the points necessary to perform the required service, free from the jurisdiction and authority of the defendant.

The crews were the agents of the plaintiff and not the defendant.

Third. The plaintiff company assumed and performed the duty of keeping the boats in condition during the time mentioned in the contract. Once in every thirty days it expressly covenanted to " wash the boilers to maintain operating efficiency." The plaintiff installed at its own expense, during the contract period, a fire-extinguishing apparatus and added an additional member to the crews. Surely, if the defendant was lawfully in possession as owner, this burden would have been cast on it. Operating efficiency was no concern of the plaintiff company if the defendant was operating the boats as owner thereof. If the defendant took the boats over and was operating them, the duty of keeping them in repair and good order belonged to it, and the cases so hold.

Fourth. The parties themselves have by their own conduct construed the contracts as one for service and not as a demise of the vessels. The *Ira M. Hedges* sank while towing a barge of coal from Perth Amboy, N. J., to the Erie Basin Dry Dock, and the plaintiff company, at its own expense, raised and repaired her. Such a manifestation of ownership and the assumption of the responsibilities of ownership indisputably stamp the transaction as a direct and unequivocable acknowledgment that title and possession of the boats remained in the plaintiff company. No claim is made in

this suit for the expense incurred in this respect and possession may have been said or done at the time the plaintiff company did as set forth above, and paid the damages incident to the event. The available cases, without exception, in charter parties construed as a demise of a vessel hold that in cases of collision and sinking the pro hac vice owner is responsible for the losses occasioned thereby. *Plant Investment Co.* v. *United States,* 45 C. Cls. 374.

The *Hedges* was in the physical possession of the plaintiff company during the whole period of her reconditioning. She *was of no service to the defendant for a little over fifty-four days out of the charter party time, at a per diem expense of $150 a day, or more than $8,100, being in actual use but twenty-six days out of the full time required.* While this is the most aggravated incident of the entire transaction, it necessarily impresses as a clear recognition by the plaintiff company of its legal liability under the contracts to assume the burdens of the actual navigation of the boats. The defendant was in urgent need of tug service. The war required the use of every available instrumentaility to get the Army overseas, and it is not to be presumed that it would have allowed, under the contracts, this degree of remissness if both the opportunity and the power and authorty existed to forestall it. It might have taken over the boats as it did other shipping facilities, and thereby left no doubt as to the character of the transac-

tion. However, in my opinion, it pursued the opposite course and simply employed the vessels for a stated per-diem service and a stated per-diem rate of pay, without the assumption of title and the correlative responsibilities of an owner *pro hac vice.*

Finding V, if I correctly understand it, is simply intended to disclose the service rendered by the boats, i. e., that while engaged in the service contracted for the defendant had the use of the boats and gave explicit orders as to what towage they were to do, and of course, while so engaged, they were under the exclusive orders of the defendant. The plaintiff could not avail itself of the boats during this period in any other towage service without violating its contract. The decided cases, however, do not hold facts of this nature as determinative of the issue involved. It is self-evident that under a contract for service the defendant would necessarily have the direction of the boats, and under the terms of the contracts they were subject at all times stated in the contracts to its orders. They were employed by the defendant to do such towage service as it directed. These facts, however, do not convert a contract for service of the boats into a demise of the same. The mere giving of orders as to what barges should be towed, when they should be towed, and by what boats, from point to point, is not in law sufficient to characterize the transaction as taking that measurement of

control over the boats contemplated in a demise of the same.

The plaintiff's crews navigated the boats during all the period of time covered by the contracts. The boats were in the possession of crews employed and paid for by the plaintiff; agents of the plaintiff operated the boats; they directed their course from point of departure to destination through the waters of the harbor; they, as agents of the plaintiff, were responsible for the safety of the boats and cargo aboard. No one might contend that the defendant assumed responsibility for the safe navigation of a boat, when it was without authority to select or discharge the crew which was to navigate it. As was said in *Pollock* v. *Cleveland Shipbuilding Co.,* 56 Ohio St. 655:

" Navigation is the science or art of conducting a ship from one place to another, and the science or art of ascertaining the position and directing the course of vessels, especially at sea, by astronomical operations or calculations; a nautical science or art; shipping."

Towage service by tugboats is not the kind of marine service usually involving a demise of tugboats. The very nature of the service itself does not, unless especially contracted for, suggest a taking over of the boats themselves. In the ordinary course of business it would be considered a hired service and no more. The cargo transported is usually aboard a transport of the charterer, and the service of the boats is limited to towing the

same from point of embarkation to point of discharge. The crew of the tug navigates the same, and the crew of the transport navigates it in keeping with the tug's course.

These reviews are in full accord with the decisions of this court in *Leary* v. *United States,* 14 Wall. 607; *Reed* v. *United States,* 11 Wall. 591; and of the previous rulings of the Court of Claims in *Donald* v. *United States,* 39 Ct. Cls. 357; *Plant Investment Co.* v. *United States,* 45 Ct. Cls. 374.

These reviews further emphasize that the facts and conduct of the parties determine the case to be ruled by the cases above cited and reviewed and not by *United States* v. *Shea,* 152 U. S. 178. In this latter case, the court (Justices Fuller and Jackson dissenting) admitted " the question is not free from doubt." The fact there controlling the opinion of the Court of Claims (p. 181) was that the Quartermaster in charge of the vessel demised, certified that the vessel was " in the exclusive control and management of the government, *being manned and navigated by employees of the quartermaster's department.*" The quartermaster's department also held the claim proper and just. The owner was to provide only engineer and fireman, the government to provide the master and crew. We read the facts to admit that the master and crew were provided by the quartermaster's department. Thus possession and control passed to that department. To constitute a demise the owner

must part with the " entire command and possession and consequent control over navigation."

If the charter be declared a contract for service rather than a demise, it follows the deductions are proper and the claim should be dismissed. If the owner failed to perform his undertaking to provide a full crew or to maintain and supply the vessels so as to enable them to perform the service, it would be responsible in damages for such breach measured, in this case, by the charter hire for such period. The tug could not be said to be placed in service or employed in service during such off periods. The same rule applies with respect to the period the owners had the tug during the period of her raising and repairs. The tug was not then " in service." *United States* v. *Shea*, 152 U. S. 178; *Clyde Commercial S. S. Co.* v. *West India S. S. Co.*, 169 Fed. 275, 277 (C. C. A. 2nd Cir. 1909).

CONCLUSION

The government suggests that the judgment of the Court of Claims should be reversed.

Respectfully,

JAMES M. BECK,
Solicitor General.

J. FRANK STALEY,
Special Assistant to the Attorney General in Admiralty.

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In the Supreme Court of the United States

OCTOBER TERM, 1924

UNITED STATES, APPELLANT
v.
CORNELL STEAMBOAT COMPANY, APPELLEE } No. 265

APPEAL FROM THE COURT OF CLAIMS

REPLY BRIEF OF THE UNITED STATES

We review the arrangements for the charters of the several tugs.

Tugs *Primrose* and *Charlie Lawrence:* By letter dated November 21, 1917, the owner agreed "to charter" the tugs "with a single crew and everything found except coal and water which you are to furnish at the rate of $75 for each and every day per tug, beginning November 22, 1917. It is understood that these two tugs are placed in service on trial for several days, and if they meet with your requirements, formal charter party will be executed for the hire of these tugs by you continually until June 1, 1918, at the same rate, with the privilege of renewal after that date."

By letter dated November 24, 1917, the Government accepted the charter "according to the conditions stated in your letter." No formal charters

thereafter ever were executed for these tugs. For six days the *Primrose* was a 12-hour tug at $75 per day and thereafter until April 11, 1918, a 24-hour tug. The tug *Charlie Lawrence* was in service 13 days in January, 1918. The deductions made for these tugs were:

Charlie Lawrence	$106.25
Primrose:	
December	125.00
February	956.25
March	1,575.00
April	1,493.75

The tugs *John T. Welch* and *Ellen M. Ronan* were chartered by letter dated December 1, 1917, and fixed at the rate as follows:

> Delivery * * * Dec. 3rd; extent of time, June 1st, 1918.
>
> The price of the *John T. Welch* to be $80 per 12-hour day for each and every day of the charter period. The price of the *Ellen M. Ronan* to be $150 per day of 24 hours for each and every day of the charter period.

The government on December 7, 1917, accepted these offers. The *Ellen M. Ronan* was in service 101 days, from January 1 to April 11, and the *John T. Welch* was not in service after January 1. From the hire of the *Ronan* deductions were made as follows:

January, 192 hours	$1,200.00
February, 59 hours	368.75
March, 108 hours	576.56
April, 14 hours	87.50

Tug *Ira M. Hedges:* The findings of the Court of Claims do not state the letter upon which the

Hedges was chartered. The exhibit to the petition (R. p. 2) agrees to charter the *Hedges* "to be chartered to you in all respects same as the tug *Ellen M. Ronan* at $159 per day * * * charter to be in all respects similar to letter of even date relative to the *Ellen M. Ronan.*" By reason of an accident, owner had the *Hedges* for purposes of repair for little over 54 days, and hire covering such period totaled $8,100, and the vessel was in actual use but 25 days out of her full service. The net deductions show:

January, 552 hours	$3,450
February, 576 hours	3,600
March, 90 hours	550
April, 180 hours	1,125

Victoria: By letter dated December 5, 1917, "time of charter to be from date of delivery until June 1, 1918 * * *. The price is to be $150 per day of 24 hours for each and every day of her charter period." Proposal accepted December 8, 1917 (R. p. 19). Vessel was in service from January 1 to March 31, 1918, and the deductions made were:

January, 100½ hours	$628.12
February, 48 hours	300.00
March, 168 hours	1,050.00

H. D. Mould: By letter dated December 19, 1917, owners stated the terms:

> This tug we understand to be only for temporary charter or use, so we give you the tug *H. D. Mould,* and the price will be $100 for each day of 12 hours, we to furnish everything in connection with her operation.

Letter of acceptance dated December 21, 1917, reads:

> In regard to your favor of the 18th instant regarding the use of the tugboat *H. D. Mould* at the Army Piers, hire for two or three days at $100 per day, you are advised that your offer is accepted.

The *Mould* was in service 23 days in January and 28 days in February and deductions were:

January, 71 hours	$591.67
February, 84 hours	700.00

Wilson P. Foss: By letter dated December 12, 1917, owners stated:

> We will charter to you the tug *Wilson P. Foss* for use at Hoboken Army Piers at $80 per day, we to furnish everything in connection with her maintenance and operation, with the exception of coal and water. * * * The *Foss* is to operate with a single crew. * * * The time of charter will be indeterminate, but we will endeavor to keep her there during the winter months and as long into the spring as we can spare her.

The *Foss* was in service from January 2 to July 1, 1918. The Government made deductions as follows:

January, 41 hours	$273.00
February, 60 hours	399.96
March, 96 hours	640.00
April, 150 hours	1,000.00
May, 48 hours	320.00
June, 72 hours	480.00

J. G. Rose: By letter dated December 31, 1917, the owners stated:

> We are to furnish her with a double crew for 24 hours' service and to find everything in connection with her operation. The price is $150 per day of 24 hours for each and every day of the charter. * * * It is agreed that the tug *J. G. Rose* shall be allowed one day in each 30 to wash boiler and that this wash-boiler day shall be paid for at the foregoing rate of hire.

On January 21, 1918, the government advised owner as follows:

> Your proposal * * * to charter the above tug to the Army Transport Service from date of delivery, December 31, 1917, to March 31, 1918, at a rate of $150 per 24-hour day, is hereby accepted.

Deductions for the *J. G. Rose* were made as follows:

January, 126 hours	$787.50
February, 12 hours	75.00
March, 194 hours	1,215.62

S. L. Crosby: By letter dated December 31, 1917, owners stated:

> We are delivering for one day's charter, double crew at $150 per day of 24 hours, we to furnish everything, with the exception of coal and water.

The proposal was accepted January 1 and the vessel was in service one day, for which the government claimed a deduction of 12 hours, or $75.

R. J. Foster: By letter dated January 11, 1918, owner stated:

> We will have a double crew on the tug *R. J. Foster* to-night so that her rate from this time on until such time as she is singled down again, and in your service, will be $150 per day. * * *

Acceptance was made under date of January 25, as follows:

> Your proposal of January 11 to charter the above tug at the rate of $150 per 24-hour day from January 12, 1918, to a date to be advised, is hereby accepted.

Deductions were made as follows:

January, 24 hours	$150
February, 48 hours	300
March, 52 hours	325
April, 132 hours	825
May, 72 hours	450
June, 60 hours	375

Charlie Lawrence: By letter dated January 26, 1918:

> We delivered to you today (January 26) the tug *Charlie Lawrence* to work as long as you need her at the rate of $75 per day, we to furnish everything in connection with her operation. * * *
>
> We will deliver to you tomorrow the tug *G. W. Decker* to work double crew for such time as you may need her at the rate of $150 per day. * * * Please understand that the *Charlie Lawrence* operates with a single crew.

On January 27, 1918, the government accepted the proposal for the tug *George W. Decker,* and it was in service 4 days in January. The government made deduction for 12 hours, or $75.

By finding III (R. p. 25) the deductions noted, save for the *Ira Hedges,* were made " if a tug reported with a short crew, or not in condition to perform the service required, or if too long a time was consumed in the opinion of the officer in charge when taking on supplies."

The larger deductions for the *Ira Hedges* (finding IV) relates to off hire during the period the tug was repairing due to her sinking. The tug was raised and repaired at owner's expense. The dissenting opinion suggests that these repairs covered a period of 54 days and the tug was only in use by the government 26 days out of the full period required. The doctrine of mutual covenants as applied to the facts requires the owner to furnish full crew and maintain the boat efficient for the service as a condition precedent to the right to hire, and therefore when the tugs were not so manned, equipped, and provided, charter hire for the period can not be collected.

The rule is stated in *Clyde Commercial S. S. Co.* v. *West India S. S. Co.,* 169 Fed. 275, 277 (C. C. A. 2nd Cir.):

> Irrespective of the special provisions and exceptions, there can be no doubt that, if the owner failed to perform any of its

> covenants, it would be responsible in damages to the charterer which might be measured in some cases by the charter hire and which in other cases might be more or less than the charter hire. If the charterer failed to perform its covenants, it would likewise be liable to the owner in damages, measured if the failure were in payment of the charter hire by the amount of hire unpaid with interest, or, if it were a failure to provide coals or pilots or pay port charges, measured by the amount of the damages so caused to the owner.

Whether this doctrine be applied as condition precedent or the claim be considered one for set-off or counterclaim, the deductions for hire during the period that the vessel was not manned nor maintained and supplied are proper.

We have made careful examination of the cases discussing right to make deductions for off hire where the terms of the charter party provide that hire shall be paid from the time that the vessel is delivered under the charter party until she be again returned to the owner. In these cases the parties have stipulated by special clause the conditions under which off hire shall be declared. The parties thus by special arrangement having stated when off hire is payable, the courts have construed the off-hire exceptions to be exclusive and deny the right to deduct hire for any cause not within the exceptions agreed upon. However, where the parties by special arrangement do not provide off-hire excep-

tions, the rule of mutual covenants, we have stated, must be applied, and, irrespective of an arrangement to pay continuous, if the owner is in default in the performance of duties which he has assumed, hire must be suspended.

In *United States* v. *Shea,* 153 U. S. 178, the exact question was presented, but discussed with reference to whether the charter was a demise or an arrangement for service. The court required hire to be paid because it concluded the charter arrangement constituted a demise. The reasoning suggests that if the arrangement had been otherwise, hire could not be recovered.

If the charter arrangement was a contract for service, as the owner then was responsible for safe navigation, the government should not be held responsible for hire during the period of raising and repairing where the accident happened through the fault of the owner's servants. In this respect, while the general principles otherwise stated in *Havelock* v. *Geddes,* 10 East 555, at page 564, are sound, at page 566 the application of the agreement to pay hire is conditioned upon the fact that the vessel is not fit for service owing to any default of the owner. If the charter be construed a contract for service, as the vessel sank while navigated by the servants of the owner, such sinking must be said to be owing to the default of the owner. The *Hedges* then could not be employed under the charter through the neglect or fault of the owner. In this view, the owner can not recover hire during the

period of repairs. We emphasize, as we read the opinion, the court in *Havelock* v. *Geddes* would have denied hire during the period the vessel was repairing, had it appeared that the defect in the ship occurred through the default of the owner.

We also observe that the general arrangement made was that the price of the vessel "to be $150 per day of 24 hours for each and every day of the charter period." Unlike the usual provision, it is not an arrangement to pay hire from the time of the delivery of the vessel until her redelivery, but relates to each and every day of the charter period.

We suggest these conclusions:

(1) The contract is one for service of the tug and not a demise.

(2) The application of the doctrine of mutual covenants determines that deductions properly are made from hire for periods of time when the tugs were reported with short crews or not in condition to perform the service required and where too long a time was consumed in the opinion of the officer in charge when taking on supplies.

(3) As the contract was one for service of 24 hours per day, if the tug was not available for use because of accident occurring through the fault of the servants of the owner, hire does not become payable during period the vessel is not fit for service but is undergoing repairs.

The government understands there can be no dispute but that the owners selected and paid the

crew and furnished everything except coal and water. I do not think it is disputed that the cause of the sinking of the *Hedges* was in going ashore and stranding which presumably must be through the fault of the officers and crew of the tug. If the findings are not full and accurate in these particulars, it is believed the case should be remanded. The obligations of owners appear by the informal contracts, and the presumption is that the contracts were performed as the parties agreed they should be.

THE TEST WAS THE ARRANGEMENT CONTRACT FOR SERVICE

Upon the argument, after a careful analysis of a great many cases, we suggested that the most practical test to be applied for determining whether the charter is one of demise or one for service is the test laid down by Lord Esher in *Baumvoll Manufactur von Scheibler* v. *Gilchrist & Co.*, L. R. Q. B. D. (1892) 252, at pages 258 and 259, which we quote:

> The question then arises, When is the captain the owner's captain? He is the owner's captain if the owner appoints him and exercises authority over him, or has a right as between themselves to exercise that authority over him which an owner has ordinarily to exercise over his captain. I say "as between themselves," because the owner may have given a right to the charterer inconsistent with his exercise of that authority. Still, if the captain is the servant of the

owner, appointed by him on ordinary terms, the captain can not say, "You have no right to order me to do anything; you have transferred that right to some one else." He can not say that because he is the owner's servant, and the owner would have a right to dismiss him immediately if he did not obey his orders.

Then was this captain the captain of the owner? It seems to me, after listening to all the cases that have been cited from the time of Lord Ellenborough downwards, that through all the cases it has been assumed that the question depends, where other things are not in the way, upon this, whether the owner has by the charter, where there is a charter, parted with the whole possession and control of the ship, and to this extent, that he has given to the charterer a power and right independent of him and without reference to him to do what he pleases with regard to the captain, the crew, and the management and employment of the ship. That has been called a letting or a demise of the ship. The right expression is that it is a parting with the whole possession and control of the ship; and in such case the captain is not the captain of the owner, and if so he has no authority to bind the owner by any bill of lading or by any contract. I have said that this appears to me to go through all the cases, and I have pointed out passages in them all, beginning with the case of *Frazer* v. *Marsh* (1), decided by Lord Ellenborough when sitting in banco. There Lord Ellen-

> borough uses an expression which I think is the right one. He does not speak of " demise " but of " control and possession," for he says, " to say that the registered owner, who divests himself by the charter party of all control and possession of the vessel for the time being in favour of another, who has all the use and benefit of it, is still liable for stores furnished to the vessel by the owner of the captain during the time, would be to push the effect of those acts much too far."

Judge Hough in the *Santona case,* 152 Fed. 516, 518, adopted the same views and said:

> The difficulty lies, not in the statement of the rule or the recognition of the consequences thereof, but in its application to the infinitely varying circumstances of contract between shipowners and charterers. It appears to me that the best test of the applicability of the rule to any given state of facts is to inquire whose were the agents who wrought the injury out of which the controversy in hand arose. It is the same inquiry put by Lord Esher, in 1 Q. B. 258: " When is the captain the owner's captain? " That question, as applied to this case, is: Was the mate, when tallying cargo, the owner's mate? And the answer to that question must be ascertained by considering the provisions of the charter party affecting the receipt, carriage, and delivery of cargo as between owner and charterer.
>
> Under the very ordinary form of time charter involved in this cause it shocks

knowledge common to all men acquainted with maritime business to say that the owner has surrendered the possession or control or command or navigation of his ship. But he has surrendered control of her freight and passenger capacity and handed the same over to the charterers for all lawful purposes. The ship is the owner's ship, and the master and crew his servants for all details of navigation and care of the vessel; but for all matter relating to the receipt and delivery of cargo, and to those earnings of the vessel which flow into the pockets of the charterers, the master and crew are the servants of the charterers. There is, in fact (to borrow a simile from another branch of the law), an estate carved out of the ship and handed over for a specified term to the charterer, and that estate consists of the capacity of the vessel for carrying freight and earning freight moneys and the use of the vessel, master, and crew for the advancement of the charterer's gains. It follows that when the mate was tallying cargo he was the charterer's mate, and the set-offs for shortage claimed by the respondent are disallowed.

The same rulings further are suggested in the *Omoa Coal & Iron Company* v. *Huntley*, L. R. 2 Common Pleas (1876) 464.

We therefore urge that the charter arrangements thus made can not be applied to transfer entire command and possession and consequent control over navigation of these tugs to the charterer.

The definite arrangement by owner is to man, equip, and provide everything, save coal and water. The government making deductions because full crews were not provided, etc., is a declaration that the government has not assumed control over the command of the tug. The owner is responsible for the appointment of the men, payment of their wages, and their discharge and discipline. It follows that the owner is responsible for the navigation of the tugs while thus under the control of the men so appointed and disciplined by it.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.

J. FRANK STALEY,
Special Assistant to the Attorney General in Admiralty.